

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	4:04CR3140
)	
Plaintiff,)	
vs.)	MEMORANDUM
)	AND ORDER
JOSEPH W. MONDAY,)	
)	
Defendant.)	

The defendant, who was sentenced on February 14, 2006, to 292 months' imprisonment for his involvement in a methamphetamine conspiracy, has filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, claiming ineffective assistance of counsel. The motion is now before the undersigned district judge for initial review in accordance with Rule 4 of the Rules Governing Section 2255 Proceedings for the United States District Courts, which provides:

(a) The clerk must promptly forward the motion to the judge who conducted the trial and imposed sentence or, if the judge who imposed sentence was not the trial judge, to the judge who conducted the proceedings being challenged. If the appropriate judge is not available, the clerk must forward the motion to a judge under the court's assignment procedure.¹

(b) The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

¹ I conducted the trial and sentenced the defendant.

The defendant alleges, first of all, that prior to trial his court-appointed attorney failed and refused (a) to give the defendant copies of discovery materials, (b) to communicate with the defendant or to accept his collect telephone calls, (c) to provide the defendant with an evaluation of his case, or (d) to convey the government's plea offers to the defendant. The defendant maintains that he would have pleaded guilty had he been properly informed. Second, the defendant alleges that he was without proper representation at trial because his attorney (a) admitted the defendant's guilt in front of the jury, (b) permitted the defendant to testify, (c) did not compel the defendant to accept a plea bargain, and (d) disputed drug quantities at trial rather than having this issue determined at sentencing after a guilty plea. Third, the defendant alleges that his attorney was not adequately prepared at the sentencing hearing to argue for a sentence reduction based on acceptance of responsibility. Finally, the defendant alleges that after his sentence was affirmed on appeal to the Eighth Circuit, his attorney refused to file a petition for writ of certiorari and was granted leave to withdraw based on a false affidavit.

Because it does not plainly appear at this preliminary stage that the defendant's motion must be dismissed, I will order the government to file an answer. The defendant may file a reply to the government's answer within 20 days after service. Thereafter, I will determine whether an evidentiary hearing is required with respect to any issue.

When answering, the government may also file a motion for summary judgment with respect to some or all of the claims alleged by the defendant. Any such motion shall be supported by a brief filed in accordance with NECivR 56.1(a), and may be responded to by the defendant within the time and in the manner prescribed by NECivR 56.1(b).

Accordingly,

IT IS ORDERED that:

1. The government shall file an answer to the defendant's § 2255 motion on or before August 24, 2007.
2. The defendant may file a reply to the government's answer within twenty (20) days after its service.
3. The government may also file a motion for summary judgment on or before August 24, 2007, and, in such event, the defendant shall have twenty (20) days to file a response.

July 25, 2007.

BY THE COURT:

s/ Richard G. Kopf
United States District Judge